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In The

Supreme Court of the United States

October Term, 1974

No. 73-1708

KEVIN J. BURNS, INDIVIDUALLY AND IN HIS CAPACITY AS COMMISSIONER OF THE STATE OF IOWA DEPARTMENT OF SOCIAL SERVICES; AND MICHAEL RYAN, INDIVIDUALLY AND IN HIS CAPACITY AS DIRECTOR OF THE SCOTT COUNTY DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

v.

LINDA ALCALA, JANE DOE AND JOAN ROE, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED,

Respondents,

BRIEF FOR WILLIAM L. LUKHARD, DIRECTOR OF THE DEPARTMENT OF WELFARE, COMMONWEALTH OF VIRGINIA

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BRIEF FOR WILLIAM L. LUKHARD, DIRECTOR OF THE DEPARTMENT OF WELFARE, COMMONWEALTH OF VIRGINIA

This brief as *amicus curiae,* in support of the position of petitioners, is filed by William L. Lukhard, Director of the Department of Welfare of the Commonwealth of Virginia, by his counsel, the Attorney General of Virginia, pursuant to Rule 42(4) of the Rules of this Court.

Interest Of The Amicus Curiae

Lukhard is petitioner in *William L. Lukhard* v. *Jane Doe,* Supreme Court of the United States, No. 73-1763, presently pending before this Court on his petition for a writ of cer-

tiorari. The issues raised in No. 73-1763 are the same as those presented in the instant case.

QUESTION PRESENTED

Whether the Social Security Act, 42 U.S.C. § 601, *et seq.*, mandates payment for unborn children pursuant to the Aid to Families with Dependent Children program, where such payments have been interpreted for over twenty-five years to be optional by the Department of Health, Education and Welfare, the agency charged with the responsibility for administering the Act, and where Congress has acquiesced in such interpretations?

STATEMENT OF THE CASE

This is an appeal from an order: (1) enjoining the petitioners from refusing to grant payments pursuant to the Aid to Families with Dependent Children (AFDC) program to respondents who are eligible but for the fact that they have not given birth, and (2) declaring that Iowa's policy of excluding payment for unborn children was violative of the Social Security Act, 42 U.S.C. § 601, *et seq.*

Pursuant to the AFDC program, the Social Security Act provides, *inter alia*, for payments to "a dependent child who has been deprived of parental support or care by reason . . . (of) continued absence from the home . . . of a parent."[1] Iowa and Virginia have elected to participate in this program. Since 1941, the Department of Health, Education and Welfare (HEW) has permitted payments for unborn children.[2] Since at least 1946, HEW has construed such payments to be optional. Iowa and Virginia are two of 35 jurisdictions which have elected not to make such payments. The definition of "dependent child" found in 42 U.S.C. § 606(a), is silent as to inclusion of unborn children.

[1] 42 U.S.C. § 606(a).

[2] 45 C.F.R. § 233.90.

SUMMARY OF ARGUMENT

Congress authorizes payments to "dependent children" under the AFDC program pursuant to 42 U.S.C. § 601, *et seq.* A rather detailed and lengthy definition of the term is found in 42 U.S.C. § 606(a). It is well settled that a state may not vary a federal definition of eligibility. *Carleson* v. *Remillard*, 406 U.S. 598 (1972); *Townsend* v. *Swank*, 404 U.S. 282 (1971); *King* v. *Smith*, 392 U.S. 309 (1968).

In construing statutes courts must give plain meaning to words. As a matter of semantics, one should not conclude that a "child" means something else, *i.e.*, an "unborn child." Further, this Court's holding in *Roe* v. *Wade*, 410 U.S. 113 (1973), would suggest that an unborn child should not be construed to be a child as a matter of general legislative interpretation.

The court below relied principally on administrative interpretation, rather than Congressional intent. However, in 1972, a bill was introduced in Congress which, if passed, would have prohibited payments for unborn children. While the bill did not pass, the language of the bill manifests Congress' knowledge of the optional program. In light of the action taken in 1972, and Congress' acquiescence in HEW's interpretation of the program for unborn children as optional for over twenty-five years, it should be deemed to have endorsed the HEW interpretation.

The AFDC program has been described by the Supreme Court as a "scheme of cooperative federalism," and the

states have great flexibility in defining "need" for purposes of welfare programs. Any analysis of HEW regulations should be done with these principals in mind.

45 C.F.R. § 233.90, the pertinent administrative regulation, provides in relevant part for federal participation in two categories. The first consists of definitions of terms used in 42 U.S.C. § 606(a). The second, which includes "unborn child," consists of several rather limited time-related situations. An examination of the "unborn child" category in the context in which it is found in the regulation, reveals that it is not intended to be a part of the definition of "dependent child." The court below committed error in adhering to administrative interpretation with respect to HEW's authorizing payments for unborn children and ignoring it with reference to HEW's position that such program is optional.

The result urged here is not at odds with the recent trilogy of Supreme Court cases which require adherence to federal standards of eligibility. In each of those cases the state's interpretation was found to be in contravention of the explicit language in 42 U.S.C. § 606(a). Neither the Act nor the regulations require payment for unborn children pursuant to the AFDC program.

ARGUMENT

1. Congressional Intent

Congress has authorized under the AFDC Program payments to "dependent children." 42 U.S.C. § 601, *et seq*. The term "dependent child" is defined as:

> ". . . a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment; . . . ." 42 U.S.C. § 606 (a).

It is clear that a state may not vary the federal definition of eligibility. *Carleson* v. *Remillard,* 406 U.S. 598 (1972); *Townsend* v. *Swank,* 404 U.S. 282 (1971); *King* v. *Smith,* 392 U.S. 309 (1968). The simple question is, therefore, whether Congress intended to include an unborn child within the definition of "dependent child."

In construing statutes, a court must of course give plain meaning to words. *Caminetti* v. *United States*, 242 U.S. 470, 485-86 (1917). It is submitted that despite the fact that a dictionary definition of a word may be found which is broad enough to include almost anything, the plain, common everyday use of the word "child" simply does not connote an unborn child, nor should Congress be deemed to have intended such a bizarre interpretation, unless it specifically so provides. The definition of "dependent child" in 42 U.S.C. § 606(a) is quite long and detailed; and yet, it says nothing about an unborn child. Further, no such strained interpretation is indicated in reading the purpose of the Act, which is to encourage the "care of dependent children in their own homes . . ." 42 U.S.C. § 601. As a federal district court said in *Parks* v. *Harden,* 354 F.Supp. 620, 623 (N.D. Ga. 1973):

> "As a matter of semantics, there simply is no way to conclude that the word 'child' includes something else which is not a 'child' namely, an unborn child."

Additionally, although this Court's holding in *Roe* v. *Wade,* 410 U.S. 113 (1973), that an unborn is not a "person" within the meaning of the Fourteenth Amendment to the United States Constitution, does not operate to prohibit unborn persons from receiving welfare benefits, it does appear to be instructive in an analysis of whether "dependent child" should be construed to include an unborn child as a matter of legislative construction, absent explicit language to that effect.

The vast majority of courts which have considered the issue of whether payment for unborn children is mandated by the Social Security Act have found an analysis of Congressional history contemporaneous with passage of the Act to be decidedly unfruitful.[3] This has been true of cases where Congress was found to have intended to provide for payment for unborn children[4] and where Congress was found not to have so intended.[5]

As previously stated, the policy of permitting payments to unborn children was instituted in 1941, and has apparently been considered optional since at least 1946. Congress has, with full knowledge of HEW's interpretation, amended the Social Security Act on numerous occasions since that time and has yet to change the statute so as to mandate inclusion of an unborn child within the definition of dependent child.

[3] Some courts have cited references to high maternal death rates in the Senate and House Committee Reports presented to the Congress prior to the passage of the Social Security Act as manifesting Congressional intent that an unborn child be included in the definition of "dependent child." These parts of the reports, however, related to Title V of the Act, not Title IV, which is the subject of this litigation. Title V, of course, relates specifically to maternal care. See H.R. Rep. No. 615, 74th Cong., 1st Sess. 12 (1935) and S. Rep. No. 628, 74th Cong., 1st Sess. 20 (1935).

[4] See, *e.g.*, opinion of the Court of Appeals in the instant case.

[5] See, *e.g.*, *Parks* v. *Harden, supra,* at 623.

In fact, in 1972, the Congress had before it a proposal which would have eliminated payment for unborn children on even an optional basis. The House Ways and Means Committee in H.R. 1, Rep. No. 92-231, stated, at p. 184:

> "Your Committee wants to make clear that an unborn child would not be included in a definition of a child. This will preclude the practice now used in the AFDC Program in some States, of finding that an unborn child does meet the definition, thereby establishing a 'family' even before the child is born."

A similar bill was introduced in the Senate. Such provision was not adopted. No action was taken because Congress determined to deal only with the adult categories of public assistance. It is submitted, however, that the very language of the bill manifests that Congress was aware of HEW's policy of permitting payments for unborn children, if indeed twenty-five years of acquiesence, standing alone, does not. One must conclude that Congress has no intention, at least at the present time, of changing the HEW policy, and, accordingly, has manifested its intent through its policy of inaction.

In fact we have a situation similar to that before the United States Supreme Court in *Flood* v. *Kuhn,* 407 U.S. 258 (1972). In that case the question of the applicability of the antitrust laws to professional baseball was raised once again. While recognizing the anomaly of one sport's being exempt from antitrust laws while others were not, the Court said:

> "... We continue to be loathe, fifty years after *Federal Baseball* and almost two decades after *Toolson,* to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implica-

tion, has clearly evinced a desire not to disapprove them legislatively.

* * *

And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, not judicial action." 407 U.S. 258, 283-285.

While the prior "decisions" in this case are HEW policy, rather than court decisions, Congress has, nevertheless, acquiesced in HEW's option policy with respect to unborn children for over twenty-five years. The remedy, it is submitted, is congressional, not judicial.

2. Administrative Interpretation

The AFDC Program has been described by this Court as a "scheme of cooperative federalism." *New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973). See also *King* v. *Smith, supra; Dandridge* v. *Williams*, 397 U.S. 471 (1970). It is well settled that a State has great flexibility in defining "need" for purposes of welfare programs. *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *Dandridge* v. *Williams, supra*. It is against this background that an analysis of HEW's administrative interpretation of the AFDC program should be undertaken.

The Court below devoted little discussion to Congressional intent. It found instead that since unborn children are "eligible" for payment, then payment is mandated, relying upon *King* v. *Smith, supra; Townsend* v. *Swank, supra;* and *Carleson* v. *Remillard, supra*. While the above trilogy does stand for the proposition that a federal standard of eligibility may not be altered by a state, it is submitted that such legal

principle does not provide a resolution of the issue in the instant case.

An analysis of the pertinent HEW regulations is instructive. 45 C.F.R. § 233.90(c) is headed "Federal financial participation." Section 233.90(c)(1) begins:

> "Federal financial participation under title IV-A of the Social Security Act in payments with respect to a 'dependent child' as defined in 406(a) of the Act, is available within the following interpretations: . . ."

Definitions of certain words and phrases used in 42 U.S.C. § 606(a), which provides for payments to dependent children under certain circumstances, follow.

The specific interpretation in question in the instant case is found in 45 C.F.R. § 233.90(c)(2)(ii), which reads in pertinent part as follows:

> "Federal financial participation is available in:
>
> * * *
>
> "Payment with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis;"

It is significant that § (c)2 has no language with respect to interpretations or payments to dependent children, as is found in § c(1). An examination of the other provisions found in § c(2) is also informative. In addition to payments being available for unborn children, payments are also available under that section for: (a) a child who goes to live with a qualified relative within thirty days of the first payment [§ c(2)(i)]; (b) the entire month during which a child

leaves the home of a qualified relative [§ c(2) (iii)]; and (c) persons acting for qualified relatives in an emergency [§ c(2)(iv)]. These situations are those which clearly do not fall within literal definitions of 42 U.S.C. § 606(a), but they manifest an attempt on the part of HEW to deal with certain limited and time-related problems. Even if it could be argued that the definitions in § c(1) are mandatory, such treatment would be inappropriate with respect to these rather narrowly drawn areas of financial participation. Further, if "dependent child" were intended to be inclusive of an unborn child, why not place that language in § c(1) with the rest of the definitions?

The court below relied upon HEW's policy of authorizing payment for unborn childrren while ignoring its policy of deeming such payments optional. It is respectfully submitted that such approach is incorrect. What is at issue is, of course, Congress' intent. Normally, some weight is given to administrative interpretation, because it is deemed to be an interpretation of Congressional intent. Had HEW defined dependent child to include unborn child, this would have been entitled to some weight. Had HEW defined dependent child to include unborn child and, then, said that payments were optional, it would be clearly wrong under *King, Townsend* and *Carleson*. But they did not do this! They authorized payments for unborn children and in other certain limited situations, in no way related to a definition of child, and said that such payments are optional. If such payments are not authorized by Congress, then, of course, HEW's administrative interpretation should be disregarded. If such payments are required, then, of course, it matters not what HEW's interpretation is. But to rely on HEW's interpretation on the one hand and ignore it on the other is to grossly misuse that principle of statutory construction.

The result urged here is not at odds with the teachings of *King, Townsend* and *Carleson*. In *King* v. *Smith, supra*, this Court simply said that the State of Alabama's interpretation of "parent" as used in 42 U.S.C. 606(a), to include an able-bodied man cohabiting with the mother, violated the Act. Alabama's plans, containing such a provision, had been submitted to HEW, but had never been approved. In *Townsend* v. *Swank, supra*, this Court found that Illinois' definition of dependent child was in conflict with the explicit language of 42 U.S.C. § 606(a). Finally, in *Carleson* v. *Remillard, supra*, "continued absence" was found to include absence due to military status. All of these cases found that the definitions as set out in 42 U.S.C. § 606(a) were not followed, and none relied on administrative interpretation.

As this Court said in *New York State Dep't. of Social Services* v. *Dublino, supra:*

> "In those cases *(King, Townsend* and *Carleson)* it was clear that state law excluded people from AFDC payments whom the Social Security Act *expressly* provided would be eligible." 413 U.S. 405, 421 (1973). (Emphasis supplied).

For the reasons stated in part (1) of the argument, the Act does not expressly, or otherwise, provide for payments for unborn chidren. Neither do the regulations mandate them.

CONCLUSION

For over twenty-five years HEW has permitted states to compensate unborn children at the option of the state. Thirty-five jurisdictions have elected not to make such payments. Congress with full knowledge of HEW's policy has

so far refrained from changing it. For the reasons stated herein, this Court is requested to reverse the decisions of the Court of Appeals below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stuart H. Dunn, a member of the Bar of the Supreme Court of the United and counsel for the amicus, hereby certify that I have served three copies of the foregoing Brief by depositing same in the United States Post Office, first class postage prepaid, this 18th day of November, 1974, to Lorna Lawhead Williams, Special Assistant Attorney General, State Capitol, Des Moines, Iowa 50319, counsel for petitioners and Robert M. Bartels, College of Law, University of Iowa, Iowa City, Iowa 52242, counsel for respondents. All parties required to be served have been served.

STUART H. DUNN